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ELS Enforcement 1965-1974

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EMPLOYMENT DISCRIMINATION:
45 YEARS OF ENFORCEMENT OF TITLE VII OF THE
CIVIL RIGHTS ACT OF 1964
ELS ENFORCEMENT 1965–1974

BEGIN TRANSCRIPT

RICHARD UGELOW: We have a great panel to discuss the early cases brought by the Section, and Dave’s interview is a nice segue to this panel. I will introduce the moderator, who is Joel Contreras, [w]ho will then introduce the panel. And I would like two things: one, everybody should use the microphone; and two, we will try to leave a few minutes for questions at the end, okay?

[Joel] has a distinguished record in employment discrimination litigation, and today he is an administrative law judge with the State of California, so Joel?

JOEL CONTRERAS: I would like to begin by pointing out that when President Lyndon Baines Johnson signed the Civil Rights Act of 1964,¹ he had present with him people that had worked long years and he gave out pens: Clarence Mitchell; Whitney Young; Roy Wilkins; Ed Randolph, who headed the Porters—Pullman Porters—for many, many years; and Martin Luther King, Jr.

In his remarks, [President Johnson] specifically stated, “It provides for the national authority to step in when others cannot or will not do the job. . . . [W]e have come now for a time of testing. We must not fail. Let us close the springs of racial poison.”²

He did not know—and we did not know at that time—how long this time of testing would endure. That time of testing during these early years, litigation of Title VII, continues. What we realize now is that there is an ebb and a flow to it. When the opportunity presents itself, you have to seize that opportunity and make [the] most use of the resources and the time afforded; that time came to us in the early years—1965 to 1974. In one other

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

2. Radio and Television Remarks Upon Signing the Civil Rights Bill, 1 PUB. PAPERS 843–44 (Jul. 2, 1964).

footnote I would like to mention, since I am from California, at this point was in the vote on cloture, there was a first-term Senator from California, Clair Engle. Unfortunately, Senator Engle had suffered brain cancer

and had surgery in April of 1964. He was unable to speak, but he was present in the Senate chamber for the vote on cloture. When his name was called, he made a gesture which was recorded as "aye," and his "aye" vote was part of historic vote for cloture. So we remember him, among others, who are able to step forward and provide these opportunities.

Starting our panel discussion this morning is Frank Petramalo, Jr., a 1969 graduate of Georgetown University Law Center. He now represents approximately 1,800 thoroughbred horse owners and trainers who race at Colonial Downs in New Kent, Virginia. Should you need that assistance to recoup your retirement losses, Frank is available for consultation.

FRANK PETRAMALO: Let me start by saying I have several horses that are for sale if anybody would like to see afterwards. But I would like to talk about the first five years' worth of litigation by the Employment Section; probably from [19]65 to 1970. It was not technically the Employment Section until the later part of [19]69.

But in the first five years, the [Department of Justice] ("DOJ") brought a number of lawsuits against building trades unions.³ And by building trades unions I mean the electrical workers, plumbers, sheet metal workers, ironworkers, et cetera, who work on large commercial structures, not homes. [F]or example, building a law school like this would include operating engineers, ironworkers putting up the structural steel, the plumbers and sheet metal people putting in the air conditioning and the water, and of course the electricians.

Now, the government looked at those unions as targets for a couple reasons; one, in those days, [19]65 to [19]70, the urban areas in the country were highly organized by unions and had large minority populations, and the jobs in the unionized construction sector were very high paying.

Now, the other factor is the inexorable zero. Those construction unions were virtually all white. Dave mentioned the Philadelphia Plan.⁴ In the City of Philadelphia, and the area around it, about thirty percent of that population was black. Only one percent of the membership in about five or six unions that did all the work on construction were black, so that was what it looked like in the period from [19]65 to [19]70.

So the [DOJ] brought suits against isolated local unions in various cities like New York and in the Midwest—Indianapolis, Cincinnati, St. Louis, East St.

3. See *United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36*, 280 F. Supp. 719 (E.D. Mo. 1968), *rev'd*, 416 F.2d 123 (8th Cir. 1969); *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969); *Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969).

4. See *Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159, 163–64 (3d Cir. 1971) (explaining that the Philadelphia plan was introduced to force the ironworkers, plumbers, pipefitters, steamfitters, sheet metal workers, electrical workers, and elevator construction workers to abide by the Department of Labor's affirmative action mandate).

Louis—and even in places that you would not expect, like Las Vegas, which had a small minority population.⁵ But it soon evolved into taking a more broad-based approach rather than suing an odd union here or there.

So what we did was [to] start moving city by city to attack all of the building trades in a particular city; one of the first ones that we undertook was in Seattle. Seattle at that time had a population [that was] about seven or eight percent black, and this kind of explains a little also as to how the [DOJ] often got into suits. In Seattle, there were a number of large public projects underway, including a hospital and a community college, and I think maybe even the predecessor of the current football stadium out there, the Kingdome, or whatever it was called.

Anyway, a number of community organizations picketed those jobsites because there were no minorities working on the jobsites, and it got rather heated and there were arrests and injunctions and things of that sort. So the chief federal judge out there, William Lindberg, called up the Attorney General and said, “Do something about this.” Well, the doing something about it was five lawyers from the Employment Section going out to Seattle to file suit.⁶ And we eventually sued five local unions out there: [the] ironworkers, sheet metal workers, plumbers, electricians, and operating engineers, who among them had 6,000 members. [A]nd of that 6,000 membership there were only three black members.

We then went on to replicate that same pattern in other cities like New Orleans and East St. Louis.⁷ [L]ater on, we even spread out statewide. We brought suit against all of the ironworker locals in the state of California.⁸ And then we brought suit against an operating engineers’ union that cut across three states: California, Nevada, and Utah.

And it is important to understand why we were suing the unions. Normally you think what has a union got to do with anything? All they do is sit there and negotiate on behalf of the employees for wages and terms of conditions. Well, that is not really the limit that unions have in the building trades industry, because, in the building trades industries, the unions really functioned more as an employer in the following respect: employment in the industry is transitory; workers go from job to job. [After] they build American University [Washington College] of Law, then they go downtown and put up a government building, et cetera, and you have the workforce constantly changing and you have probably dozens and dozens of contractors involved in the process. Well, to simplify things, what happened in the industry is all of the contractors got together in an association and they bargained with a union; for example, let us take the electrical workers. And they set up a collective bargaining agreement

5. See, e.g., *United States v. Local Union No. 212, Int’l Bhd. Of Elec. Workers, Local 212*, 472 F.2d 634 (6th Cir. 1973); *United States v. Int’l Union of Operating Eng’rs, Local Union No. 520*, 476 F.2d 1201 (7th Cir. 1973).

6. *United States v. Local No. 86, Int’l Ass’n of Ironworkers*, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff’d sub nom. United States v. Ironworkers Local 86*, 443 F.2d 554 (9th Cir. 1971).

7. *United States v. Sheet Metal Workers Int’l Union, Local Union No. 36*, 280 F. Supp. 719 (E.D. Mo. 1968), *rev’d*, 416 F.2d 123 (8th Cir. 1969); *Local 53*, 407 F.2d 1047.

8. *United States v. Ironworkers Local 86*, 443 F.2d 544 (1971).

that provides that the union will supply the workers; it is called an exclusive hiring hall. So if you need an electrician, you do not go and advertise in the newspaper if you are an electrical contractor, you call the union, and the union sends out its members.

So our reason for attacking the unions initially was because they really control the employment. And probably, through the years, the pattern has been lessened somewhat because there is more and more competition from non-union segments. So where you had a city like Washington, D.C., which probably in the [19]60's and [19]70's was ninety percent union, at least in terms of construction, today it is probably forty percent union, but at that time it was very important.

Now, we had to go about proving discrimination under Title VII. We had to prove a pattern or practice, and we always ran up against the initial argument from the defendant unions that this was not a pattern or practice. So we had some interesting cases early on that defined what a pattern and practice was; that it is something that was usual, pervasive, and not an isolated incident.

Now, in proving the pattern and practice, we kind of followed the [theory of] we win with our witnesses and the defendants' records, and this is part of what Dave had alluded to earlier. From early on in the Division, it was drummed into us that it was important to know all of the facts, and that meant if you had a thousand pages of union records you read the thousand pages and knew what was in them. But our proof really broke up into probably about four different areas; the first thing was the statistics. I mean it did not take a rocket scientist to convince a court that it was meaningful to look at a minority population of thirty percent and compare it to building industry unions that had zero percent minorities in it. But again, we had to litigate this issue in terms of whether or not statistics had any probative value, and, of course, they did.

But the next thing that we did in putting together a case was look for witnesses. Now, this was not always easy for a number of reasons. These unions were well known in the communities, and they had discriminatory reputations, so it was not unusual to run into very few minority electricians or plumbers who [didn't have] anything to do with any of these unions because they knew it was a waste of time to go there.

But we always did manage to find individuals who themselves had experienced discrimination, and we went about doing this in a number of . . . interesting ways. First of all, we of course had complaints, either through organizations like the NAACP or the Urban League; even [the] EEOC would refer complaints of individuals to us, but that was just the starting point. We would [also] comb through [the] unions' records to look for indications that blacks or Hispanics had sought union membership, and it was not always easy identifying who was a minority.

I remember taking a deposition of the business agent in Seattle and I asked him whether Joe Albertosi was black because the businessman claimed he was. And he said, "Well, you know, he is either black or Italian; I can't tell the difference." Yes, that is true. That is true. Turns out he was one of my tribesmen; he was Italian.

But in any event, we also used to look for other ways to define people who had contacts with these unions. For example, in Los Angeles, when we sued

ironworker locals there, ironworker locals used certified welders. In order to be certified, you have to be licensed by the city. So we went down to city hall, pulled all the licenses, and lo and behold they have a picture on them. So you go through a thousand licenses, you come up with 100 black applicants or black licensees. And then we had the luxury of sending out the FBI to talk to these 100 people to see whether or not they had ever had any contact with the ironworkers local and then we would follow up.

But the bottom line is we were always looking for live victims of discrimination to give some context to the all-white statistics. And then we would couple that with the records of the union, which were absolutely invaluable and gave all trial lawyers their thrill. Because [when] we have always put on a black witness, he would say, "Well, I went down to the union and ask to be referred out to work and they told me there was no work," and we put on a string of people like that. "Or they told me the membership rolls were closed and I could not join." And lo and behold, the business agent from the union would take the stands and, "Yup, we did not have any work, the books were closed." But, by gosh, you pull out their records, and the fun of being a trial lawyer is when you catch somebody in a lie. And you pull out their records, and bingo, when they were not taking any applicants, just turns out there w[ere] twenty-five whites who were accepted into membership.

There was one case I [will] never forget. The business agent was swearing up and down that there was no work in Seattle and he could not find new jobs for electricians. At the same time, we had him telling his local union, which was reflected in the minutes, that they were in tough shape because they did not have enough workers to supply the employers' needs for electricians, so I mean, that is what we went through in terms of proving a case.

And the last thing that we always threw in there was the evidence about the reputation of the unions in the community, and you say, "Hmm, what's that?" That and a dollar will get you a cup of coffee at Starbucks. Well, it was very helpful, because there were times when we had few live witnesses, and we would have to explain why it was not unusual for minorities to have nothing to do with these unions, and that was because it was well known that you were wasting your time. So we would bring in community people and they would testify that this was what the reputation was.

But during the course of all this litigation, this initial stuff in the first five years, we had a number of interesting legal issues: Whether or not evidence of pre-Act discrimination—that is discrimination occurring before July of 1965—was admissible, and also what types of statistics were admissible, and I had said before what constitutes a pattern or practice. All very interesting, not particularly difficult to win; but the other side would always argue vigorously that all we had here was perhaps an isolated incident of discrimination.

But the real challenge in the litigation came not so much from proving discrimination, but rather from remedying discrimination. It was quite easy when you had individual victims who were denied work referral or denied membership. Fine, the court orders that they be given membership or be given work referral, and in some cases even be given back pay—although that was another legal issue as to whether or not the Attorney General was authorized to seek back pay.

But the real problem with the relief went to systemic relief. Once you get beyond the specific discriminates, the issue is what do you do going forward with respect to the operations of these building trades unions? Early on, some of the early cases that were decided simply said, “Well, do not discriminate, and publicize that you do not discriminate, and make efforts to recruit minority members or minority individuals who want to take part in training programs.” But not surprisingly, that did not yield much of a change; you still had all white unions.

So what we did was seize upon the notion set forth in the Philadelphia Plan; that is, in the Philadelphia Plan, because it was federally-assisted contracting, under the Executive Order at 11,246.⁹ The Executive Order already said not only should you not discriminate, but you have to take affirmative steps to bring minorities into the work force. And what they did was set goals so that over a five-year period those contractors had to have twenty-five percent minority in their work force.

And what we did was seize upon that notion of goals and put that into our request for relief in these building trades cases. And we were successful—ultimately the courts did conclude, in the face of arguments, that this violated Section 703(j) of the Act, which says no preferential treatment because of a racial imbalance.¹⁰ The courts concluded that that did not limit the remedial authority of the court once there was discrimination found. So that was fairly interesting and that kind of got us through into the mid [19]70’s and really was the precursor to the forty-year-old debate now still going on about affirmative action and racial[ly]-conscious relief.

Now, there are a bunch of other issues involving unions, but most of those the other panelists are going to deal with, because those are the industrial unions. They don’t really play any role in hiring, but their role has to do with seniority systems and whether or not the seniority systems that the unions have negotiated had to give way in light of past Act discrimination, pre-Act discrimination. That [was] my hook; I ha[d] to keep going.

JOEL CONTRERAS: Our second panelist, Bob Marshall, joined the ELS in January of 1970, and he transferred to the criminal section of [the] Civil Rights [Division of the DOJ] at the end of 1971 and left in 1973. After leaving Washington, D.C., he became an Assistant U.S. Attorney in Colorado and since then has been in civil litigation with various firms and is presently a civil litigator with the law firm of Carpenter & Klatskin in Denver, Colorado. Bob?

BOB MARSHALL: Thanks, Joel. I would like to start out by saying a couple years ago I came back [for] the anniversary of the Civil Rights [Division] reunion and I got to see a lot of my compatriots and talk to them, and every one of them, without exception, had become very successful in whatever field they [were] in. And I talked to several of them and asked them what they attribute that to, and they said, “To being here, [in] the Civil Rights Division.”

9. Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965), *superseded in part by* Exec. Order No. 11,478, 34 Fed. Reg. 12985 (1969), *reprinted as amended in* 42 U.S.C.A. § 2000e note (2006).

10. 42 U.S.C. § 2000e-2 (2006).

They learned how to prepare, how to investigate, and how to try a case. They learned how to work hard and that taught them how to become successful. And so working here I think was the core attribute to get us all started in our legal careers.

When I started here, we had . . . much latitude to go anywhere in the United States and take on any industry, because, you know, discriminatory practices were rampant everywhere. And my first case was actually a case that already had been brought, and Bill Finton and I took over and it was against the St. Louis-San Francisco Railroad.¹¹ And with railroads, there was a position called train porter. If a white man or black man came in [and] applied for a job, they took a physical, they took a written exam, and the white man would be hired as a brakeman and the black man would be hired as a train porter.

Now, the train porters are often confused with chair car porters. Chair car porters were the guys that rode in the passenger trains and sold pillows or rented pillows to the passengers. The train porter, while the train was moving, assisted the chair car porter, [but] whenever it stopped he had to run to the front of the train and brake the train and throw the switches, and he did all of the same work as a brakeman did, but the brakeman rode in the caboose while the train was moving.

Well, the case had already been brought, and you've already been told we were taught to prepare everything we possibly c[ould]—look at every record.

I [heard] a rumor that there existed a document that actually put [the discriminatory practices of the railroad union] in writing. I went over to the National Archives and went down in the basement, and found in a box an old charter of the National Brotherhood of Trainmen which said that coloreds can only be hired as porters. It was actually in writing, and we used that in the trial. It was no longer in effect, it started in the early 1900's, but it remained in effect for [twenty] or [thirty] years. And they officially changed the charter, but they still follow[ed] the same practices.

Well, we had a trial coming up just a few months after I started, and so under Dave Rose's instructions we had to meet our witnesses; we had to talk to them, we had to find out what they are going to say.

So I went out, up and down the railroad line from Birmingham, Alabama to Tupelo, Mississippi to Springfield, Missouri to Kansas City to St. Louis to Tulsa . . . and interviewed these train porters. Because what had happened is the passenger trains had slowly gone out of existence and there were not jobs for train porters anymore, and brakemen were just switched to a freight train. Well, the train porters were laid off; they did not have jobs anymore, because even though they had done all the jobs of brakemen, they could not go over to the freight trains. And they loved the railroad; they loved everything about it. And I would go and interview them in their homes and talk to them, and I would have to ask them to come and testify. And this was asking [them] to do a fairly dangerous thing, because they love[d] the railroad and they did not want whatever happened to them to happen to the next generation. So they took on the dangerous task, in this case the testifying, and also it had economic impact, too, because it meant they were not going to be offered any other jobs.

11. United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972).

But we had a strategy, because we knew from prior hearings with this judge, Roy Harper in St. Louis, Missouri, who was the Chief Judge, that he was a racist—[he] just told it to us; used words that left no doubt about it. So we knew that we were going to lose. It was a matter of putting a case or a record in that we knew could win on appeal.

So we took like [thirty] depositions, and we made a decision that we would only call four or five of the train porters to testify, and we put the rest of them in under preservation of testimony and put their deposition testimony in where the railroad lawyers could not do anything about it.

We went into a three week trial in St. Louis, Missouri [with] Judge Harper—the defense lawyers did not have to do anything. Every time we had a witness on that was making any point, he would start screaming at us. And I finally said, “Well, are you ruling that I cannot ask this question?” And he would yell at me some more, and so I would ask the question again, because he never said I could not ask it. And so we just kept going and it became a real struggle, but we got the entire record in, we got the evidence in, everything we needed.

Their big defense was that train porters did not really do all the work as written and that they only did thirty or forty percent of it, where my own witnesses were saying, well, they did like ninety percent of it. And they could not do anything about the written testimony, but they did put on some witnesses that were train porters [who] were afraid. And so they said, “Well, now, maybe I only did thirty or forty percent of the job of the brakeman. But I had a rebuttal witness that I put on that came in and testified that, yes, he did ninety or 100 percent of the job of the brakeman, and Judge Roy Harper almost came out of his seat, but it still got in.

And at the end of the trial we waited for months, and he finally issued a long opinion, ruling against us, and we appealed it to the Eighth Circuit Court of Appeals, and the appeal was affirmed. And so we took it in a petition for a hearing en banc, and—Bob Moore, I see is coming in—argued the case, and the entire Court of Appeals of the Eighth Circuit reversed and gave the judgment to the United States and ordered that these train porters could have jobs on the freight trains and they would have their seniority. And we could not get them back pay in those days, but we did get them the seniority and any jobs that came open, and in fact, they were great jobs for some of them, and we finally did get that relief, and that was the . . . railroad story.

I was going tell one additional story because I had a little extra time, as Frank was talking about trade unions. You could pick any trade union in the country; [they] had to be almost all white. And I went down and selected the electrical union in New Orleans, and it was an all-white union; there were no blacks in it.

And when we brought a case, the case was prepared to the point where we should win it as soon as we got it, because we had all the documents together, we had all the statistics together. We found witnesses who had applied for the union and had not gotten in, and so then all we had to do was bring it and try it.

In this particular case, as part of the preparation after I brought the case, we took the deposition of the president of the electrical union. And I was asking him: “You know, sir, I understand that you have had black applicants that have passed the physical, they have passed the written test. When they come in for

the interview, the subjective part of the application, they never score as well. Why is that?" And this president of the electrical union looked at me and he said, "You know, I have thought about that a lot, and to tell you the honest truth, it is because I believe that blacks are afraid of electricity." His attorney's head hit the table and the deposition was over and the case was over. They signed a consent decree the next week which provided for affirmative action for the program. Another attorney in our session, Joel Selig, then brought together all the trade unions in New Orleans and they all signed consent decrees.

And right after that, and within a few months is when they signed the contract to build the Superdome, and all these unions all had jobs and they are all required to only hire black workers in order to go on the jobs, so that was a pretty good turnout. And I guess you will see in the summary they said about my time there, I value my time at the [DOJ] probably as the most productive time—the best time—I have [had] in my legal career. I have made a lot of valuable friends and I have learned how to try cases, and it has been something that has helped me through the rest of my career and I appreciate it.

JOEL CONTRERAS: Thank you, Bob. Our next panelist, Squire Padgett, who is in private practice in the District [of Columbia], has cards available. He began his work with the Employment Litigation Section in June of 1970, and he served there until July of 1982. So he covers this initial time of testing and then some. Squire?

SQUIRE PADGETT: Thank you. I want to start off by following up on something that Vicki Schultz said about immersion. I came there June 1st, and subsequently you learn if Dave Rose shows up at your door [at] about five o'clock in the evening, [it is] either real good news or real bad news.

The first day I was there, and that afternoon, he told me that I was going to go down to Birmingham, Alabama with three other lawyers: one was named Jack Razeko, the other named Mike Thrasher, and . . . another lawyer named Susan Reeves. Razeko and Thrasher—you did not work with [them], you worked for [them]. Their egos did not allow you to do [work with them]. Susan Reeves [and I] had to go home and tell our family from the first day of work that we are going out of town and we d[id] not know [for] how long. At that point in time, we went out for weeks at a time.

Well, those two guys wanted to investigate and make the litigation. They wanted to do it by Monday. We got down there on a Wednesday. We came back Friday night. They wanted us, Susan and I, to be in the office by 8:30 on Saturday morning to put the evidence together, write the justification memo, and they turned the justification memo in on Monday, and that became *U.S. Steel—United States v. United States Steel*¹²—which was the first of those steel cases that subsequently became the nationwide steel litigation. That was my very first immersion.

I ended up in June of 1982 with—I was the lead lawyer in *Bazemore v. Friday*,¹³ which went to the Supreme Court and established the precedent as it

12. *United States v. U.S. Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975).

13. *Bazemore v. Friday*, 478 U.S. 385 (1986).

related to use of regression analysis in establishing employment discrimination. The case was turned over to me by one of those meetings with Dave saying, "Squire, I think you ought to look at—you may want to take [a] look at this litigation." And it was something that had been started three or four years ago, and as everybody knows, you do not want a case that three or four lawyers have had, because no matter what it is there are some traps there.

But we started the trial on December 7th, 1981, and the judge was a Judge Dupree, down in Raleigh, North Carolina, who I won't say he was like Judge Harper, but he was close. And he kept saying, "if you do not like what I am doing, take it up Route [One]," which meant throw it up to the Fourth Circuit, which was no picnic either.

We tried that case from December 7th with a day and a half off for Christmas, a day-and-a-half off for New Year's, until February 28th. We lost in the trial court, and then I decided it was time to leave, and it was appealed to the Fourth Circuit through the good work of David Marblestone, who is here today. Then it was a rehearing involved, it went up to the Supreme Court, and they reversed a [nine to zero] morality opinion. And one of the things they said about the evidence [was that] it was very persuasive in a number of ways.

But the case was litigated on the way back down to the Fourth Circuit and all the way back down to the trial court. And I can remember very distinctly at the Court of Appeals argument on the way back down, the lawyer was arguing, and he kept making the same argument he made before. And Judge Russell, who if you know anything about the Fourth Circuit, was not a friend of ours, but he at least said he was with Howard Manning, Jr. He said, "Mr. Manning, we heard you say that and gave you that on the way up, but the Supreme Court told us that [would not be] acceptable, "so I think you ought to tell us something a little different with this argument, all right?"

But that was the way I ended it; that was the twelve years. It was really very, very intense, and not only in terms of the litigation, but the people you travel with. I was fortunate enough to travel with both of these guys on either side of it. But if you have ever traveled with Joel Contreras—Joel does not ship his luggage. He does not check his luggage; he carries everything, so I started carrying it. And if you want to see security appear very quickly, you have Joel carrying everything and me carrying everything walking through the airport. Yes, we knew what the [Transportation Security Administration ("TSA")] was before the TSA knew what it was.

But to start off, very briefly, [with] a [discussion of a] couple of the other cases. Other than [the] railroad cases, I was able to try and be lead lawyer in literally [almost] every kind of case they had including trucking cases [and] trade union cases. And I can remember very distinctly a case—that Bob developed before he left—against the sheet metal workers in Cleveland [in] the Northern District of Ohio; where we fully litigated the case and it was before a Judge Kopanski who became a very good judge on the Sixth Circuit. And we won, and he was giving us relief, as Frank was talking about the remedies, like two for every three referrals—two of them were going to have to be African-American. [A]t the time, [we had] some other issue; we thought that wasn't good relief and we appealed to the Sixth Circuit. How we would like to have that now, right?

And then I went from there to a number of other kinds of cases, including a case in the state and local governmental area against the City of Miami in Dade County, and I will tell you about development of [that] litigation in just a second.

But we ended up negotiating a consent decree, *United States v. the City of Miami*,¹⁴ that I am very pleased to say is still in force and effect right now; went up to the Fifth Circui[t]—and then we ended up having to argue it en banc, and I think that is probably the highlight of my legal career. It was just before the Fifth Circuit split up into the Fifth and Eleventh Circuit, and there was an en banc argument that I had. And if you ever had an en banc argument, first of all, you know how stressful that could be. But it was twenty-three judges, and Dave Rose had the argument right behind me in another case. But they were sitting in rows, and you hear a question, and you would look over there, and everybody is just kind of looking at you.

But it ended up they preserved the consent decree and [it] went back down. And it went back up again to the Eleventh Circuit and it was still preserved, but I still view that in terms of the legal argument. I am one of the few lawyers who probably ever argued before that many judges and consider that to be very, very fortunate.

And one other kind of case that involved the state and local governments which we subsequently took over; we had a case against the State of Texas which Lorna Renadeer was very, very helpful [on] as a paralegal. And as everybody who was in the Employment Section knows, it was better to have a good paralegal than a second lawyer; they did all of the work that for a long time I did not know. That was probably the biggest settlement ever reached involving a state government for a long time and had about eleven state agencies; and . . . we were able to settle that. It was very, very taxing—it was kind of like herding cats; you did not quite know who you were going to be dealing with from time to time—but it was incredibly intense and fun.

And what we would do—and the part that I want to kind of emphasize—here in terms of developing the litigation; we heard some of the things Frank said and you heard some of the things that Bob said. [I] don't know how many of you have ever heard of [standard metropolitan statistical abstracts (“SMSAs”)], but it is put out by the Department of Commerce and the Bureau of the Census, every ten years, and it is going to happen again; the viewer of the census will put out these—the SMSA . . . is a breakdown of these metropolitan areas. For example, and [the] D.C. metropolitan area at one time included D.C., Prince George's County, and Montgomery County. I believe now it is expanded to include Baltimore [and] Howard County and whatever Baltimore is.

But they do a breakdown, and it gives very, very detailed information about the ethnic and sexual makeup, the economic income, whatever-have-you. [W]ith the state and local governments and these county governments and police, fire, and all these, it is very important to look at that because you get a real clear idea if there is [let] us say . . . a police department. Let's say the Prince George's County Police Department, which includes at one time I remember, twenty-five to thirty percent African-Americans. And if you look at the fire and

14. *United States v. City of Miami*, 664 F.2d 435 (Former 5th Cir. 1981) (per curiam).

police department and school board and whatever-have-you and it comes out to be like a great statistical difference, it is at least an initial targeted instrument.

And you would also use such things as Frank was talking about, union contracts and other indicia to develop a theory, or at least to target who you were going after. Once you targeted them, then you would have to do what Frank was talking about and Dave always wanted. He was very nice about it, but they always said they wanted warm and bloody bodies, and so we would have to go and get these victims. And I have one delightful story about trying to get a victim related to *East St. Louis*.¹⁵ We were looking for an applicant—any applicant we could find—to the electrical union. And I learned from someone that they said that they knew a guy who was an applicant, and this is one of the things all of us know. Half of the people in the neighborhood of the community do not know people's real names; could be men, women. And they said that, "This guy"—I said, "Well, what is his name?" They said, "I do not know." I said, "What do they call him?" They said, "light bulb." I said, "Well, how can I find him?" He said, "You know, he always hangs out at a bar right there at St. Claire and 26th Street" or wherever it was. And I said, "What time?" He said, "He will be there about five." I said, "Well, how will I recognize him?" He says, "You will know."

And so you were hooked to have some fun. I walked in this bar and sat there, you know, trying to look—and looking in that government suit, with the Ford Fairlane parked out front. And in walks this guy with a head that you would not believe.

And then my next problem was how to introduce myself and what to call him, you know, and I just started in the middle of a conversation. I said, "Hey, I understand that you may have tried to get a job with the electrical union and I am kind of look[ing] at the electrical union." I mean that turned out to be an incredibly bright guy who had been a good app[licant] and with the whole thing, but that was one of the kind of little ways that you did it. And if you showed up on the east side of Cleveland with Bob and me in some of these housing projects, trying to find applicants, and you say [you're] from the [DOJ], that just did not work. But it was intense, it was fun, and I do think we made a difference, and I still think it has made a difference.

JOEL CONTRERAS: Thanks, Squire. Our next panelist is Doug Huron. He has been practicing employment law for [forty] years. He began in 1970 with the [ELS]. He is currently with [the] D.C. firm of Heller, Huron, Chertkof, Lerner, Simon & Salzman. [He] is married to Amy Wind, the Chief Mediator for the D.C. Circuit. Doug.

DOUG HURON: This is a true story. About five or six years ago, this neurological disease really set in and I started using this machine to talk. I would tell people who had not seen me in a while that I am not as bad as I look or sound, but I gave that up after I said [that] to an old friend whom I had not

15. *United States v. Int'l Union of Operating Eng'rs, Local Union No. 520*, 476 F.2d 1201 (7th Cir. 1973).

seen in several years. He replied without missing a beat: “You were never as bad as you looked.”

More than anything else, today is a tribute to Dave Rose. That is appropriate for many reasons. Not only for his unparalleled leadership [in] advancing [the concept of] fair employment, but also for his work [in] training young lawyers to emulate him and to be diligent, doubtful, and unflappable. I am personally indebted to Dave in a host of ways.

I am speaking last on this panel because this is a segue to the panel after lunch, which deals with police and fire cases and the testing guidelines, [and] among other things, of course, the trade bar for the guidelines was the Supreme Court’s decision in *Griggs v. Duke Power*.¹⁶ And my first assignment from Dave after I started in July 1970 was to write the legislative history of Section 703(h) of Title VII for the Solicitor General’s read in *Griggs*.¹⁷ And to do that, I had to read a legislative history of the Senate debate on what became the Civil Rights Act of 1964. Today the debate is probably easily searchable, but we did not have computers back then, so I had to read all the debate to make sure that I was not missing something.

Congress stood tall back then, and no one stood taller than Hubert Humphrey of Minnesota, the born leader for the civil rights bill for the Democratic majority in the Senate. Humphrey was everywhere, answering questions about the bill’s provisions, responding to quorum calls, scheduling the Republican leader, Everett Dirksen, and finally bringing him around.

And in the end, Humphrey orchestrated the book breaking the southern filibuster. That was harder in those days, because back then it took two-thirds of the Senate; sixty-seven votes, not sixty.

Humphrey was masterful as the winter of [19]64 turned to spring and finally to summer, when the Civil Rights Act of 1964 passed and was signed. He was at the peak of his powers. That came through the normally dry legislative history, but something else came through, too. The seeds of Humphrey’s downfall four years later in 1968. Two lonely senators repeatedly interrupted the debate. Wayne Morse [of] Oregon and Ernest Gruening of Alaska, addressing the chair, would ask, “Mr. President, what about the war in Vietnam?”

The day after New Year’s Day, in 1972, January 2nd, the Alabama NAACP filed suit against the Alabama State Troopers in Montgomery, the seat of the [big old] history [of] Alabama, which had only one judge, Frank Johnson.¹⁸ The troopers had never had a black officer and were the instruments used by governors such as George Wallace to enforce segregation.

Judge Johnson, in contrast, had been desegregating Alabama institutions ever since he was first appointed by President Eisenhower. In 1956, he had the Fifth Circuit Judge, Richard Reeves, form the majority on a three-judge district court that struck down the Montgomery arguments requiring segregation on buses, against which Rosa Parks and a young pastor, Martin Luther King, Jr., had led a boycott. And in [e]arly 1972, Title VII did not yet cover state and local agencies, so the trooper suit was brought under Section 1983 and the

16. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

17. 42 U.S.C. § 2000e-2(h) (2006).

18. *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974).

Fourteenth Amendment, and there was no law allowing the Attorney General to enforce the Amendment sequel, “protection guarantee.”¹⁹

But I am convinced that Judge Johnson knew what he wanted to do with the state troopers, and to do it he needed a solid record. So he appointed the United States as *amicus curiae*, with all the rights of a party. It turned out that the United States [meant] me. I had done some enforcement work upon the *Frankier* case against the Alabama merit system, which Dave talked upon and which he tried before Judge Johnson. And Dave sent me to Montgomery along with a research analyst, Helen Long. Like the other research analysts in this Section, Helen was extraordinary. The private plaintiffs were represented by Morris Dees, a self-made millionaire in the direct mail business and the founder of the Southern Poverty Law Center in Montgomery, [Alabama].

Four years later, in 1976, Morris was the chief fundraiser for an obscure ex-governor of Georgia who was running for president, and he prevailed on me to leave the Division and join the Carter campaign, but that is another story.

The troopers were about to hire a class in January 1972, and Morris moved for a preliminary injunction. Judge Johnson set it down for early February, which meant that Helen and I had about three weeks to prepare, including finding an expert in police testing.

The hearing itself went fairly smoothly, the only glitch coming when I momentarily could not find an exhibit Judge Johnson wanted to see. He bellowed, “I want that exhibit, and I want it now.” Needless to say, he got it.

At the end of the hearing, Judge Johnson said he would issue a ruling soon. At that point, Walter Allen, the head of the trooper force, spoke up. He said that the State desperately needed to hire more troopers and he pleaded with the judge to rule quickly. “Well,” replied Judge Johnson, “I can tell you what I am going to do,” and he hit the State between the eyes. “Alabama had unconstitutionally excluded blacks from the position of state trooper,” he said, “and from now on the state would be required to hire one black trooper for every white hire until the trooper force was twenty-five percent black.” That was exactly the relief requested by the United States. But as I said, Judge Johnson was way ahead of us.

In the [ELS], when I was there, there was one word that we were forbidden to use; that word was “quota.” We never asked for quotas; maybe goals, or if we were feeling especially daring, affirmative hiring ratios, but not quotas. You know the old saying, “if it looks like a duck and quacks like a duck, then it is probably a duck.” Well, what Frank Johnson did to the Alabama state troopers sure as hell quacked like a quota. We used to say that quotas were rigid and inflexible, and like goals, which were always subject to the availability of qualified applicants, but can you imagine what Judge Johnson would have done if somebody told him there were not enough qualified African Americans to meet his order? “Qualified blacks are out there,” he told Walter Allen, when he ruled from the bench. “I want you to find them.”

The old Fifth Circuit certainly understood that Judge Johnson had imposed a quota on state trooper hiring. The court sustained, and I am quoting, the conclusion of the District Judge. That quota relief was essential to make

19. 42 U.S.C. § 1983 (2006).

meaningful progress towards eliminating the unconstitutional practices and to overcome the patrol's thirty-seven year reputation as an all-white organization.

I argued the appeal at New Orleans, and Dave went down with me, probably to make sure that the word "quota" never [appeared] and it never did. But today, I am proud that I had a small role in supporting Judge Johnson's imposition of the quota. Within a decade, the Alabama troopers had more African-American officers than many highways patrolling the country.

Now, I have talked about two monumental figures in civil rights history: Senator Hubert Humphrey and Judge Frank Johnson, but I would be remiss if I did not mention another person, one who is known mainly to the people gathered here: my dear friend, Jack Davis. I got to know Jack working on the new Art Building Trades case in the early [19]70s. I saw him bluff the business manager of an Ironworkers local in a deposition, making the guy believe Jack had incriminating documents; then he utterly destroyed him. I had many friends in the Division, but Jack was the closest.

Let me say thank you to Senator Humphrey and to Judge Johnson, and a special thanks to Jack Davis, who was the best of what we had in the Division. Thank you for your attention.

JOEL CONTRERAS: Thank you, Doug. [A]t this point, I know we are going to have a few questions, but I would [be] remiss if I did not mention that in this laborious process of examining documents, often the documents would be provided. And one of the cases that we had, the attorneys for the defense brought [them] to the front. They provided tables very similar to this, much like a classroom setting. As we poured through the documents and found something that we would like copied, we had to take it up to the front, they would examine it, make their notes, then we would return [and] go back through more documents.

I gained an insight into the classroom process followed by Squire Padgett. As he sauntered up to the front with his document and handed it to the defense attorney who had clerked for Chief Justice Warren Burger, and as he took the document back, said, "Well, you know, when we have equal employment opportunity implemented in the United States, you can tell your grandchildren you opposed it," and returned and sat down. And I reflect that often, when we had the opportunity to build this foundation, we were able to do that. This afternoon you will hear how others have built upon this foundation. The work continues. The time of testing remains. Now I will take any questions that you might have.

MALE SPEAKER: The term "seniority" has been used. I thought perhaps some people in the audience might not understand the importance of seniority and the different types of seniority.

FRANK PETRAMALO: Sure, sure. I love seniority. Seniority is important in the industrial sector, because what it does is give an employee an objective basis on which to have his career judged. Generally speaking, the employer runs the operation, he owns the operation, decides who gets hired, who gets fired, who gets promoted.

The union comes in and tries to somewhat lessen that management authority by, among other things, negotiating a seniority system, which pretty much will set forth the objective standard on which people get promoted or laid off, things of that sort. I say objective because seniority just starts when you are hired and continues to accrue.

Now, the problem in Title VII litigation is there are various types of seniority. Some of the early cases they refer to [is] the *Local 189 Paperworkers*.²⁰ The problem with the seniority system there is it was not a plant-wide seniority system. There were blacks in the plant, but they were relegated to one department—the least desirable, lowest-paying—and their seniority was pretty much limited to that department. And if they wanted to transfer ultimately to the white department when they had the opportunity, they would lose all their seniority and start at the bottom.

So one of the early legal issues was whether a seniority system like that could survive, and of course it [was] concluded no; that the blacks coming over had to be credited with their total seniority with the company and not just the seniority in a particular job or a particular department.

In the building trades industry, it really was not an issue, because as I said before, the employment was really transitory; you were not building up seniority with a particular contractor. So it really, I think, culminated in the Supreme Court's decision in a teamster case sometime in 1977, where the Court went in, and for the last time decided what was lawful and what was not lawful in the way of a seniority system that might have a discriminatory impact.²¹

SQUIRE PADGETT: Well, let me just add, if you look at Title 703(h),²² which says—and that was negotiated on behalf of the unions into the Title—[that] neutral seniority systems are not to be considered discriminatory. So we were dealing with those issues, and in the *Bazemore* case²³ a seniority system was one of the issues. We were talking about state agricultural extension workers, African-Americans and whites and women; they were all doing the same thing. So when they integrated the system, instead of doing it this way, just on the basis of who started earliest and who started later, they did it this way. And so we—which is great and the way it almost always happened—ended up having to litigate that. And one of the very first—some of the very first—trade union cases and some of the writings talk about how and which way to use seniority; Richard Sovell and several others you are talking about; concepts such as Freedom Now, which means everybody knows where the seniority takes them. Or if you do it by jobs like they [were] talking about with city drivers—who may have more company seniority, but may not have as much road-driving experience—and how you deal with it. That is what most of the litigation was about.

20. *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969).

21. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

22. 42 U.S.C. § 2000e-2 (2006).

23. *Bazemore v. Friday*, 478 U.S. 385 (1986).

FEMALE SPEAKER: My question is a little forward-thinking. First, I want to say thank you to all for your wonderful years of service, having literally been a child who was born in the midst of this struggle. What would you say to those forty-five years from now who are mounting some of the same arguments opposing current legislation, such as the Employment Non-Discrimination Act?²⁴ What would you say to them in terms of their fight against it, and would you look at it and say, “Forty-five years from now you can tell your grandchildren that you opposed this?”

FRANK PETRAMALO: Gee, you are asking us to tell you what is going to happen in forty-five years. I can’t even pick the winner of the next race. You know—I think Dave mentioned—it is incremental progress. I mean, when you are young, you expect things to change overnight. But I think as a young lawyer what you have to realize is that it is going to take a long time, a step at a time, to get to a goal, and, hopefully, you will get there. Now, it is not going to be all a straight line; it is going to go up and down, up and down. But I think ultimately if you look back over our history, we usually wind up in the right place.

SQUIRE PADGETT: I would add one thing. I guess I will say it this way as a trial lawyer. I have had several situations where I had tried cases and then appellate lawyers were looking at the transcript and were asking me why didn’t I ask this question, that I could have made a better record, and I said it this way: while I was standing there I was trying to save what I had as much as I was trying to move the ball forward. And I think that with the last—since Ronald Reagan—much of what we have been doing is trying to save what we had as opposed to moving forward, and I think that is still [the] issue. I think there are forces out here who still believe that people of color and women and others who fight for these things [are] inappropriate—these are not the real Americans. And I view it very, very differently. I [think that] we are the real Americans. It is those who oppose the dreams and hopes of all of us that are not the real Americans.

BOB MARSHALL: I guess I would respond that I think our whole life we were fighting to do the right thing. We are trying to fight for right to prevail over wrong, and we were here; when we were doing our work, I felt that is what I was doing. I was trying to right past and present wrongs, and that battle will always be here. Through your whole life you will be doing that, and forty-five years from now they will be doing it, too, and I think it is a moral battle that you always will be fighting.

JOEL CONTRERAS: I also think part of the challenge is that we have not seen an effective communication [on] the value of the progress. The South would not have been as industrialized as it has been without access to a labor force that was better educated, that could compete for jobs—that is part of what happened through the Civil Rights Act of 1964.

24. Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1548, 111th Cong. (2009).

The unfair advantages that people enjoyed came at a cost, and part of our challenge is to do a much better job of letting people know that when discriminatory testing fails, then, normally, everyone benefited. There was inside information on those tests. Many of them had been memorized, so people had an unfair advantage, because when they went in to take those tests they knew what they were taking. So when those tests were thrown out, everyone benefited. Everyone competing for those jobs had a better opportunity than those who were on the inside. If you had a tile-workers' union, as they did in New Jersey, that said you had to be related in order to become a member, there were not just minorities and women who were excluded, there were a lot of people in the general community that could not compete for those jobs.

We have not done the kind of job that needs to be done to let the people of America know how important it was for this country to be able to compete on the basis of merit, not only in jobs, education, housing, et cetera, and this country is stronger—it has avoided a lot of violence that has occurred in other countries—because of the fact that we stepped forward at that time.

Additional efforts will have to be formulated. There will always be a reaction anytime there is significant change. And this has been one of the greatest social changes that [has] occurred in the history of the United States. Remember, it was over one hundred years after the Civil Rights Acts of 1866, 1873, and [the] Fourteenth Amendment were rendered ineffective by the courts.

Part of the challenges that we were looking at was [whether] the federal government and the people of America [would] support these important changes in 1964? Fortunately, many of those changes have been implemented. They have not been implemented without a reaction, but they have been implemented.

END TRANSCRIPT